U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 August 2003

Case No.: 2002-LHC-1851

OWCP No: 5-112611

In the Matter of:

STEPHANIE N. HICKS
Claimant,

v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Employer.

Appearances:
Matthew H. Kraft, Esq., for the Claimant
Christopher R. Hedrick, Esq., for the Employer

Before:
DANIEL A. SARNO, JR.
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901 *et seq*. ("the Act"). Stephanie N. Hicks ("Claimant") sought compensation for an injury sustained in the course of working for Newport News Shipbuilding and Dry Dock Company ("Employer"). A formal hearing was held on March 24, 2003, in Newport News, Virginia.[1] Claimant offered exhibits CX 1 through CX 13; Employer offered exhibits EX 1 through EX 7. All evidence was admitted without objection. The parties agreed to stipulations on the record and both parties submitted timely post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

[1]The following abbreviations will be used as citations to the record:
CX - Claimant's Exhibit
EX - Employer's Exhibit
TR - Transcript March 24, 2003 hearing

STIPULATIONS

Employer and Claimant stipulated to, and I find the following facts:

1. An employer/employee relationship existed at all relevant times.

2. The parties are subject to the jurisdiction of the Act.

3. Claimant sustained an injury to her neck, left shoulder, and upper back arising out of and in the course of her employment on October 9, 2001.

4. A timely notice of injury was given by Claimant to Employer.

5. A timely claim for compensation was filed by Claimant.

6. Employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion.

7. Claimant's average weekly wage at the time of the injury was $320.56, which results in a compensation rate of $241.52.

8. Claimant was entitled to and was paid temporary total disability benefits at the rate of $241.52 for October 10, 2001, November 19, 2001, through December 17, 2001, and January 9, 2002, through February 20, 2002.

TR at 4-5.

ISSUES

Whether Claimant is entitled to temporary total disability benefits from October 25, 2001, through November 18, 2001; from December 18, 2001, through January 8, 2002; and from February 21, 2001 through May 9, 2002.

Whether Claimant is entitled to temporary partial disability from May 10, 2002 to the present and continuing.

FINDINGS OF FACT

Claimant's Testimony

Claimant worked for Employer as a pipefitter when she was injured on October 9, 2001. TR at 11-12. She is 27 years old. Claimant received her high school diploma in 1995 and although she has not yet received a college degree, she attended college for five years, studying sports management. TR at 37. Prior to going to work for Employer, Claimant was employed as a manager at a convenience store, where she worked for approximately one year. TR at 38. She also worked at General Electric putting units together and shipping them out, and at Bojangles as a security guard.

Claimant worked as a pipefitter for Employer for approximately two months prior to her injury. TR at 37. As a pipefitter, her duties included grading hangers and hanging pipes. TR at 12. This position required her to lift no more than approximately 40 to 50 pounds and to work on pipes overhead. *Id.* At the time of her injury, Claimant was exerting force and pressure overhead while hooking up airhoses. TR at 13. She felt a pull in her neck and shoulder, yet continued to work because she was a new employee and did not want to complain. *Id.* However, that evening Claimant was still in pain and went to the emergency room. *Id.*

The following day at work, she was informed that she should have gone to the shipyard clinic, which she then did at that time. *Id.* The clinic placed her on work restrictions of no heavy lifting and no overhead work. TR at 14. She returned to work on October 11, 2001, and continued working as a pipefitter within these restrictions. *Id.* Claimant was still able to perform her duties, i.e., grade hangers and fit pipes. *Id.* She testified that although she did not work outside her restrictions, she was in pain, yet she did not want to complain. TR at 15. She further testified that Mr. Ruple, her foreman at the time, did not give her any work outside of her restrictions, left it entirely up to her how much weight she would carry, and told her that at no time was she to work outside her restrictions. TR at 28-29. She testified that Mr. Ruple never mistreated her, was always straightforward with her, and provided safety briefings to all employees. TR at 30. She continued that although she was being worked within her restrictions, she informed 'them' that she was still hurting. TR at 29.

Claimant returned to the shipyard clinic on October 23, 2001, complaining of continuing problems and difficulties with her pain medication; it was making her depressed. TR at 15-16; TR at 38-39. The clinic told her to discontinue the medication and return to work in a light-duty status. TR at 16. However, because of her depression and continuing pain in her neck and back, she felt that she was unable to continue working. *Id.*

On October 25, 2001, Claimant informed Mr. Ruple that she was resigning her employment. TR at 16. She told him that she was quitting to go back to school. TR. at 29. She did not mention to him any problems with the work, her restrictions, or any pain as reasons for leaving her employment.

Claimant began seeing Dr. Carlson for her pain on November 19, 2001. TR at 17. Dr. Carlson removed Claimant from work until the results of an MRI could be evaluated. *Id.* The results of the MRI were normal, thus Dr. Carlson cleared Claimant to return to light-duty work. *Id.*; CX 4a. He then referred Claimant to Dr. Winfield, a physiatrist. TR at 17-18; CX 4a, 4c. Dr. Winfield removed Claimant from work from January 9, 2002, to February 11, 2002, in order to "get her pain under better control." CX 1l. Thereafter, Dr. Winfield returned Claimant to work under the same restriction of no overhead lifting. EX 1c; *see also* TR at 25. Employer compensated Claimant during no-work periods with temporary total disability payments. *Id.*; CX 13.

Claimant testified that after leaving her employment with Employer, she worked at Canon, Top Guard Security, Gateway, Walton's Sandwich Shop, and Crown Gas Station. TR at 19. Claimant submitted her W-2s, which show the wages she earned with these employers.[2] *See* CX 12.

[2]Claimant testified she worked at Canon from March 10, 2002, through May 21, 2002, at an hourly rate of $7.00 pe hour. She worked 40 hours per week. She indicated that she voluntarily terminated that position because she felt it was too painful. She worked at Gateway from June 17, 2002 through September 27, 2002 earning an hourly rate of $9.10 per hour and working 40 hours per week. She then worked at Top Guard Security from

Currently, Claimant is employed full time at Crown Gas Station and part time at Waldon's Sandwich shop, where she earns more than $320 per week, her average weekly wage at the time of injury. TR at 34-35. Both positions are within her current medical restrictions, which consist of no overhead lifting and no heavy lifting. TR at 35.

Claimant testified that she subsequently attempted to return to her employment at the shipyard. TR at 30-31. She submitted an application, yet she was informed approximately one month prior to this hearing that she was not being given a job. TR at 31. She testified that she was still willing to go back to work with Employer. *Id.*

Bernard R. Lynch Testimony

Mr. Lynch is the X-03 General Foreman for Employer. TR at 41. He is responsible for the piping on the Ronald Reagan. *Id.* He has approximately eight supervisors who work for him, who in turn directly supervise the hourly employees. *Id.* Mr. Lynch testified that Claimant was employed under a foreman who was under his supervision at the time of her injury. *Id.* Upon review of Claimants probationary evaluation report, Mr. Lynch stated that there had been no problems with Claimant's performance or attitude. TR at 42. He testified that he was aware of Claimant's restrictions and that work would have continued to be available for her as a pipefitter within those restrictions from October 2001 through at least several months, or approximately February 2002. *Id.* Further, Mr. Lynch testified that he had no personal knowledge of, or contact with, Claimant regarding her decision to discontinue her employment with Employer. TR at 44. The only information he had, which was provided to him by Claimant's supervisor, was that she had requested to be released from her obligation, as she wanted to return to school. TR at 43; *see* EX 6.

Edward Robert Ruple, Jr. Testimony

Mr. Ruple is employed as a Foreman for Employer. TR at 46. He has worked in the Pipe Department for 34 years. *Id.* He testified that he recognized Claimant and recalled that she was working for him on the date of her injury. *Id.* Mr. Ruple was aware of Claimant's work restrictions and ensured that she did not work beyond them. TR at 48. Thereafter, Claimant advised Mr. Ruple that she no longer wanted to work for Employer because she wanted to go back to school. TR at 47. This is the only reason she gave to him; she did not mention any difficulties with her restrictions or pain from her injury. In fact, Mr. Ruple testified that Claimant was eager to learn and a good worker and that he was surprised when she told him she was quitting. Tr 47-48; *see also* EX 6. Further, Mr. Ruple testified that Claimant's 60-day performance evaluation was positive and that he recommended that she continue her employment. He stated that work would have continued to be available for Claimant within her restrictions. TR at 48-50.

September 13, 2002, through December 15, 2002, making $5.15 per hour, which sometimes varied to $6.50 per hour for 40 hours per week. She quit that position because she "needed to make more money." She worked at Security Services America from December 16, 2002, through January 4, 2003. She earned $6.50 per hour there and worked 30 to 40 hours per week. She began working at Waldon's Sandwich Shop on December 21, 2002, to the present and continuing making $5.35 per hour. She works 16 hours per week at this position. On March 7, 2003, she obtained a position with Crown Gas Station, where she also continues to work, making $6.90 per hour and working 40 hours per week. TR at 19-23.

William Kay Testimony

Mr. Kay is an expert witness in the field of vocational rehabilitation. TR at 52. He completed a labor market survey for Claimant, based upon her medical records, work restrictions, personnel records, which included Claimant's application, her educational background, and work history and experience. TR at 51-52; EX 1a-u. Based upon Claimant's light-duty work restrictions, consisting of no lifting over 40 or 20 pounds, and no work overhead, Mr. Kay researched suitable available positions for Claimant. TR at 54-55. The labor market survey was dated July 16, 2002, and covered available positions in the marketplace from October 25, 2001, to that date. TR at 55. Mr. Kay identified several positions suitable for Claimant.[3] *See* EX 1h. In compiling this list, Mr. Kay spoke with the personnel managers for all prospective employers, and although he did not distribute Claimant's name, he analyzed the job descriptions and discussed the available positions and Claimant's medical restrictions, education, and experience with them. TR at 56-66. Based upon his experience, in light of Claimant's education, skills, and medical restrictions, Mr. Kay determined that Claimant had the potential for a wage earning capacity in the local labor market between the time frame of October 25, 2001, through the present of $ 386.40 per week, with an average of $280.00 per week. TR at 66; EX 1b.

CONCLUSIONS OF LAW

The Act authorizes compensation to workers injured in the course of their employment. In order to gain an award of benefits for total disability under the Act, a claimant may first establish a *prima facie* case by demonstrating that he cannot perform his prior employment due to the effects of a work-related injury. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264 (4th Cir. 1997). In order to establish a *prima facie* case of total disability, claimant need only establish that he cannot perform his usual employment; he need not establish that he cannot perform any employment. *Elliot v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). Claimant's usual employment is that which he was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 692 (1982).

Claimant contended that she established her *prima facie* case for total disability. Subsequent to her injury, Claimant was under physical restrictions against heavy lifting and overhead lifting. However, her pre-injury employment duties included overhead work and lifting of up to 40 or 50 pounds. Therefore, Claimant argued that as a result of her injury, she was unable to perform the duties of her job within her post-injury limitations. In contrast, Employer argued that Claimant did in fact return to her usual, pre-injury employment and thus failed to proved that she had any economic disability as a result of her injury.

Upon comparing Claimant's medical restrictions with the specific requirements of her usual employment, the court finds that Claimant has made her *prima facie* case for total disability. The

[3]Wal-Mart - Cashier: 6.25/hr; Norfolk Airport Authority - Parking Attendant: 9.66/hr; Randstad Chesapeake Toll Collector - Toll Taker: 8.50/hr; West - Teleservice Representative: 7.50/hr; Goodwill Industries - Donation Center Attendant: 5.15/hr; AAA - Service Representative: 7.00/hr; Security Services of Amercia - Unarmed Security: 6.00/hr; Top Guard Security - Unarmed Security: 5.15/hr; Argenbright Security - Unarmed Security: 8.50/hr. EX 1i-k.

Board has held that where a claimant cannot return to heavy work, but requires lighter duty as a result of his injury, the claimant has established a *prima facie* case of total disability. *See, e.g., Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Elliot v. C&P Tel. Co.*, 16 BRBS 89 (1984). Here, after her injury, Claimant was placed on restrictions of no heavy lifting and no lifting overhead. However, her pre-injury position as a pipefitter required her to work overhead. In fact, Claimant was injured while reaching up and applying force and pressure to hook up air hoses above her head. Therefore, it is clear that Claimant, although able to continue working for Employer within her medical restrictions, was not able to return to her usual employment and has established a *prima facie* case for total disability.

Once a *prima facie* case has been established, the burden shifts to the employer to demonstrate "the availability of suitable alternative employment which the claimant is capable of performing." *See, e.g., Newport News Shipbuilding & Dry Dock, Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988). In this case, the court finds that Employer has met its burden of establishing suitable alternate employment with no loss of wage earning capacity. Therefore, Claimant is not entitled to disability compensation and her current claim must be denied.

One way in which an employer may satisfy its burden is to itself make available to the injured employee suitable alternate employment. *Norfolk Shipbuilding and Dry Dock Co., v. Hord*, 193 F.3d 797, 800 (4th Cir. 1999) (citing *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 688 (5th Cir. 1996)). Employer provided Claimant with a light duty position as a pipefitter, which was within her medical restrictions of no overhead lifting and no heavy lifting. This was a non-sheltered position, within Claimant's physical restrictions, which provided the same average weekly wage as before the work-related accident. Claimant testified that she was aware of her restrictions, that she was not required to perform any work outside of her restrictions, that she was told by her supervisor that she should absolutely not work outside of her restrictions and that she should report any problems to him so that she could go to the clinic. Moreover, two supervisors at the Shipyard testified that Claimant's light-duty pipefitter position would have continued to be available for the foreseeable future. Accordingly, by providing to Claimant a light-duty position within her skills, abilities, and medical restrictions, Employer met its burden of establishing suitable alternate employment, with no loss of wage earning capacity. *See Walker v. Sun Shipbuilding & Dry Doc. Co.*, 19 BRBS 171, 172 (1986).

The court is not persuaded by Claimant's contention that Employer failed to meet its burden with this light duty job because she was unable to perform the position as a pipefitter and thus terminated her position on October 25, 2001. Rather, the court finds that Claimant voluntarily terminated her employment with Employer for reasons unrelated to pain or an inability to perform the light duty work provided to her. She told her supervisor, Mr. Ruple, that she was quitting to go back to school. She testified that she did not inform Mr. Ruple of any pain,[4] nor did she ask to return

[4]Claimant testified that she did not inform anyone of her pain because she "didn't know who to talk to because [she] was new . . ." TR at 16. However, she also testified that Mr. Ruple, her supervisor, was straightforward with her, did not mistreat her, provided safety briefings to all employees, and informed her that if she had a problem she should report it to him so that he could send her to the clinic. TR at 30. Therefore, Claimant's testimony as to why she did not inform her supervisor that she was quitting because of pain is contradicted by the remainder of her testimony and the court finds it appropriate to disregard Claimant's *ex post* explanation.

to the clinic to address any neck or back pain or seek greater work restrictions.[5] Therefore, the court is convinced that, based upon the testimonies of Claimant and Mr. Ruple, and the documents in evidence, that Claimant voluntarily left her employment for reasons other than pain and inability to perform the light duty work provided to her.

Further, the court is not persuaded by Claimant's argument that "the best evidence of the suitability of a job is a Claimant's good faith effort to perform the tasks required of that job." In this case, Claimant's testimony is less than credible, is not supported by the medical evidence, and is contradicted by her own testimony. Therefore, whether Claimant in fact engaged in a "good faith effort to perform the tasks" is questionable. The court is not convinced of the veracity of Claimant's complaints while working in this position, thus her testimony regarding her problems with this position are not accorded great weight. Conversely, what is not questionable is that the medical evidence supports the given restrictions, Employer provided her a non-sheltered light duty position within those restrictions, which would have continued to be available for the foreseeable future, and Claimant has never sought, nor received greater work restrictions.[6] Therefore, the court finds that the position provided by Employer was suitable.

Finally, the court has determined that Claimant voluntarily terminated her employment with Employer for reasons unrelated to pain or an inability to perform the light duty work provided to her. Therefore, Employer bears no further responsibility for identifying new suitable alternate employment, as an employer is not an employment agency, nor a long-term guarantor of a claimant's employment. *See Olsen v. Triple a Mach. Shops*, 25 BRBS 40 (1991); *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991). In this case, Claimant actually worked, within her restrictions, at a light duty position for several weeks post-injury, and stopped working for reasons unrelated to her injury. Thus, whether or not that position, or any other position, is currently available to Claimant is irrelevant in this analysis. While it is true that an employer may not rely upon positions within its control which it claims were available but were not provided or offered to claimant, this is not the case here. Employer did actually offer and provide the light duty position to Claimant. Once the Employer established that Claimant did in fact have the opportunity and ability to earn a living, its burden was satisfied.[7]

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[5]Claimant testified that she returned to the clinic on October 23, 2001 because she "was having - - [ ] was on muscle relaxers and [ ] was having problems with that." TR at 15. The clinic told her to stop the medication and returned her to light duty work with the same restrictions.

[6]The court notes that Claimant was removed from work by Dr. Carlson on November 19, 2001, pending the results of an MRI. The MRI was normal, thus Dr. Carlson cleared Claimant for work with the same no heavy lifting and no lifting overhead restrictions, and referred Claimant to a physiatrist. Thereafter, Dr. Winfield removed Claimant from work from January 9, 2002 to February 11, 2002, in order to "get her pain under better control." CX 1l. Dr. Winfield returned Claimant to work under the same restrictions. Claimant has already been paid temporary total disability compensation for these periods.

[7]It is beyond the scope of Employer's burden to require it to keep a light duty position available in case a former injured employee changes his mind and decides he wants to return to that position some months or years later. Therefore, whether this, or any other position is or is not now available to Claimant does not bear on the conclusion that such position was suitable and was provided to Claimant subsequent to her injury.

After full consideration of the record, it is the opinion of this court that suitable alternate employment, with no loss of wage earning capacity, did in fact exist for Claimant.[8] Accordingly, Claimant is not entitled to the benefits sought.

ORDER

It is hereby ORDERED that Claimant's claim for disability benefits is DENIED.

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Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/LLT
Newport News, Virginia

[8]The court finds that Employer met its burden of establishing suitable alternate employment to Claimant by providing her with a light duty position within her work restrictions, with no loss of wage earning capacity, and she voluntarily terminated that employment for reasons unrelated to her injury. Therefore, it is unnecessary to address Employer's proffered labor market survey or Claimant's subsequent jobs to determine suitable alternate employment in the open economy and any loss of wage earning capacity.